

S. C. asks the Appeals Board of the Utah Labor Commission to reconsider its prior decision dismissing Ms. C.'s complaint that Sullivan-Schein had discriminated against her in violation of the Utah Antidiscrimination Act ("the Act"; Title 34A, Chapter 5, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND AND ISSUES PRESENTED

In a decision issued January 7, 2004, Judge La Jeunesse found that Sullivan-Schein violated the Act by terminating Ms. C. in retaliation for her complaint of gender-based discrimination and inappropriate sexual comments against two co-workers. Sullivan-Schein then filed a timely request for Appeals Board review of Judge La Jeunesse's decision.

On May 31, 2005, the Appeals Board concluded that Sullivan-Schein had not retaliated against Ms. C. and, therefore, had not violated the Act. On that basis, the Appeals Board set aside Judge La Jeunesse's decision and dismissed Ms. C.'s complaint.

Ms. C. now asks the Appeals Board to review its previous decision for alleged errors of fact and law.

DISCUSSION

Factual determinations. In considering Ms. C.'s request for reconsideration, the Appeals Board has first reviewed Ms. C.'s assertions that the Appeals Board erred in its findings of fact.

Ms. C. contends that the Appeals Board failed to note Sullivan-Schein's "complete failure" to follow its own progressive discipline policy. However, as the Appeals Board observed in its previous decision, when all the circumstances surrounding Ms. C.'s discharge are considered, including the inadequacies of Sullivan-Schein's investigation in this matter, the evidence still establishes that Sullivan-Schein discharged Ms. C. for its stated reasons, and not for any retaliatory purpose.

It appears that Ms. C. concedes that the co-workers who complained about her were unaware of her earlier allegations of discrimination. The Appeals Board therefore reaffirms its finding that the co-workers' complaints, which led to Ms. C.'s discharge, were not retaliatory in nature. Nevertheless, the Appeals Board agrees with Ms. C. that the more important question is whether Sullivan-Schein management used the co-workers' complaints as a pretext for management's own retaliatory purposes. On this question, the Appeals Board remains convinced that Sullivan-Schein terminated Ms. C. because of the co-workers' complaints, and not in retaliation for Ms. C.'s letter alleging past discrimination.¹

With respect to the remainder of Ms. C.'s factual arguments, the Appeals Board has considered each of these points and is satisfied with the factual accuracy of its initial decision.

Application of law. Ms. C. contends the Appeals Board's previous decision misapprehends the elements of a retaliation claim under the Act. However, the Appeals Board's decision has correctly identified and applied those elements. It appears that Ms. C.'s main dissatisfaction is with the consideration given by the Appeals Board to Sullivan-Schein's appropriate response to Ms. C.'s original allegation of discrimination. The Appeals Board remains of the opinion that in the context of this case Sullivan-Schein's response is but one fact out of many that sheds light on the ultimate question of Sullivan-Schein's motivation for its subsequent discharge of Ms. C..

Ms. C. also argues for application of the so-called "cat's paw" rule, whereby unlawful employment action taken by a lower level supervisor or manager does not lose its unlawful character simply because it is ratified by higher level management free from any unlawful purpose. The Appeals Board sees no basis for application of this rule in this case, since the Appeals Board has concluded that no one involved in Ms. C.'s discharge had an unlawful retaliatory purpose or intent.

ORDER

Having considered the various issues raised by Ms. C.'s request for reconsideration, the Appeals Board reaffirms its previous decision and denies Ms. C.'s request for reconsideration. It is so ordered.

Dated this 25TH day of August, 2005.

Colleen Colton, Chair
Patricia S. Drawe

DISSENT

For the reasons stated in my previous decision, I would reinstate and affirm Judge La Jeunesse's decision and hold Sullivan-Schein liable for unlawful retaliation against Ms. C.. I therefore dissent from the Appeals Board's denial of Ms. C.'s request for reconsideration.

Joseph E. Hatch

1. The Appeals Board notes Ms. C.'s assertion that another co-worker, Jon Sargent, was also guilty of "cross-over" violations but received no discipline. However, the record does not establish the circumstances of Mr. Sargent's conduct. Without that information, the Appeals Board cannot assume that Mr. Sargent's conduct was comparable to Ms. C.'s conduct.